Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

TIMOTHY M. WHITE,

Petitioner,

v.

SPECTAGUARD, INC. *and*
SMI of PATTISON AVENUE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Assembly-Line Bifurcation Belong in Federal Jurisprudence?

2. Did the trial court abuse its discretion under Federal Rule of Civil Procedure 42(b) in bifurcating the instant case without engaging in an informed analysis, as part of the trial court's practice of routinely bifurcating most of its jury cases without explanation, often at the earliest stages of litigation?

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PETITION FOR A WRIT OF CERTIORARI

Timothy M. White, by his undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS OF OTHER COURTS

The district court's initial Pretrial Report and Order of June 2, 1992, in which the district court set the case for bifurcation, is an unpublished order. (App. 18).

The district court's initial Pretrial Report and Order of June 2, 1992, *as sent to counsel and not mentioning bifurcation*, is an unpublished order. (App. 19).

The district court's announcement on December 9, 1997 of its decision to bifurcate the case was not reduced to writing or otherwise explained.

The district court's order of February 17, 1998 denying Petitioner's Motion to Reconsider Bifurcation was an unpublished order. (App. 21).

The district court's order of August 11, 1998 denying Petitioner's Motion for New Trial (App. 22) is unreported.

The Court of Appeals opinion of August 27, 1999 (App. 1) is an "Unreported-Not Precedential" decision.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1999. Petitioner invokes This Court's jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 42. *Consolidation; Separate Trials,* provides, in part:

> (b) The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

STATEMENT OF THE CASE

1. The Nature Of This Case

This is a civil action for damages for permanently debilitating injuries sustained by Petitioner Timothy White ("Mr. White") at a musical concert at the Spectrum coliseum in Philadelphia, Pennsylvania on April 6, 1990. On that date, security guards employed by Respondents pulled Mr. White over a barricade and broke his neck.

Mr. White underwent a fusion of his cervical and upper thoracic spine, and thereafter underwent seven weeks of hospitalization and rehabilitation. As a result of his injuries, Mr. White continues to suffer permanent neurogenic limb, bowel and bladder dysfunction.

2. The Trial Court's Premature Decision To Bifurcate

Mr. White filed his Complaint in this case on March 24, 1992. Nine weeks later, on June 2, 1992, at the onset of discovery, before the evidence was fleshed out, and before the issues and witness lists were narrowed, the trial court set the case for bifurcation. The trial court made its decision *sua sponte*, and without briefing by counsel. The trial court's decision is noted in its Pretrial Report and Order only by the word, "bifurcated." (App. 18). The Order contains no reasoning for the decision. In the typewritten form of the Pretrial Report and Order sent to counsel, there is no mention that the trial court had decided to bifurcate the case. (App. 19).

3. The Trial Court's Later Announcement Of Its Decision To Bifurcate

On December 9, 1997, as the case approached trial, the trial court held a telephone conference with counsel. During this discussion, the trial court announced that it was going to bifurcate the liability and damages portions of the trial. This decision was not preceded by any detailed discussion of the names or number of damages witnesses or how much time the damages phase would add to the case. Neither side's counsel had asked for

bifurcation, and no party was accorded the opportunity to brief the issue.

The trial court did not follow up its oral pronouncement with a written opinion explicating the analysis, if any, it undertook in reaching its decision to bifurcate. Indeed, the trial court did not reduce its decision to bifurcate to writing at all.

4. Mr. White's Motion For Reconsideration

On February 13, 1998, counsel for Mr. White submitted a principled and lengthy motion (the "Motion to Reconsider") asking the trial court to reconsider its decision to bifurcate the case. Mr. White argued that bifurcation may not be routinely granted, and pointed out that the trial court had not offered any reasons justifying bifurcation under Federal Rule of Civil Procedure 42(b), such as judicial economy, or undue prejudice to the Respondents. To the contrary, Mr. White noted that the entire case (damages and liability) would take only five or six days to try and that the overwhelming evidence of Respondents' negligence made a liability finding likely, so that bifurcating the case would not result in judicial economy, but would lead to waste in the form of two opening statements and two closing arguments for each party.

Mr. White also argued that it was essential to his case to try liability and damages together, because Mr. White's treating orthopedist, Dr. Greene, would explain that Mr. White's injuries could *only* have happened when Respondents' security guards dropped Mr. White from the

barricade, supporting Mr. White's theory that the security guards' negligence caused his injuries.[1]

In response to Mr. White's Motion to Reconsider, the trial court held no hearing of record, but called counsel informally, on February 17, 1998. During the call, the court *placed the burden of justifying a non-bifurcated trial on Mr. White*, asking his counsel to explain, "what that gets you."

On the same day as the telephone conference, and without even waiting for the briefs of Respondents, the trial court issued an order denying Mr. White's Motion to Reconsider. (App. 21). Again, the trial court failed to support its decision with an opinion or any other writing indicating that it had engaged in the detailed, case-specific analysis called for by Rule 42(b).

5. The Trial Court's Practice Of Routine Bifurcation

The case was tried from March 2 to March 5, 1998. On the last day of trial, the jury entered a verdict finding both Respondents negligent on the basis of their employees' actions as well as on the basis of each

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[1] In his videotaped deposition testimony, which was not presented because it was part of the "damages" part of the case, Dr. Greene testified as follows:

> . . . Now the only way to break this bottom and put all that force on it is, you have to stabilize the neck here, so that you're basically all on a flat area so that the bending movement is concentrated down in that area. *So the truth is, getting pulled over the fence is probably the only way that he could have a fracture dislocation at the level that he had, which is below his fusion.*

Respondent's own negligent training of its security guards. Not having heard Dr. Greene's testimony, however, the jury found no causation.

Following the trial of the case, undersigned counsel decided to inquire into the trial court's practice with respect to bifurcation, to determine why the trial court would bifurcate a simple negligence case whose nature, complexity and size simply did not call for bifurcation. What was discovered was that the trial court has a personal practice of routinely bifurcating cases in their earliest stages, when the cases are not ripe for a reasoned bifurcation analysis, and doing so without an opinion or other writing setting forth the basis for the trial court's decision.[2]

Of the sixty-four cases reviewed, forty-five cases were actual or potential jury trial cases where the plaintiff(s) sought damages. Of these forty-five cases, the trial court set twenty-nine, or sixty-four percent (64%), for bifurcation. In seventeen of these cases, or fifty-nine percent (59%), the trial court set the cases for bifurcation at the earliest stages of litigation, in the court's initial Pretrial Report and Order. In these immediately-earmarked cases, the trial court did not justify its bifurcation decisions with opinions setting forth its analysis, if any, but

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[2] Mr. White's counsel sought to obtain a list of the trial court's cases from the clerk's office, but was informed that this information is not available to the public. Therefore, Mr. White's counsel directed his paralegal to review the trial court's cases as listed in the *Legal Intelligencer*, the local lawyers' newspaper that contains case listings with the federal and state judges. All of the trial court's cases listed for the period January, 1997 through March, 1998 were reviewed.

simply wrote the word "bifurcation" or "bifurcate" on the order. Nor did the trial court first obtain briefs by counsel on the issue whether the cases warranted bifurcation.

In bifurcating more than sixty percent of its jury trial cases, the trial court did not limit itself to bifurcating only certain classes of cases that might arguably be uniquely suited to bifurcation. To the contrary, the trial court bifurcated cases across the board, including actions for strict liability, premises liability, automobile negligence, discrimination, police misconduct and sexual molestation.

6. Mr. White's Motion For New Trial

On March 6 and 13, 1998, Mr. White filed a Motion and Amended Motion for New Trial, and on June 10, 1998, after receiving parts of the trial record, Mr. White submitted a Memorandum in support of the Amended Motion.

Mr. White requested a new trial on the grounds, *inter alia*, that the trial court erred in routinely bifurcating the case. Mr. White argued that bifurcation is to be a case-specific exception to the general rule of a unified liability/damages trial and that, accordingly, Rule 42(b) does not allow for routine bifurcation but requires that the trial courts exercise an informed discretion on the merits of each case. Mr. White argued that because bifurcation is the exception to the general rule, the party opposing bifurcation does not have the burden of justifying a normal, unified trial; rather, the burden lies with the proponent of bifurcation to demonstrate that the circumstances of the case justify trying two cases instead of one.

Mr. White argued that the law's insistence that bifurcation be the rare exception is grounded on the recognition of the jury's traditional charge of hearing cases in their entirety, so they can decide an entire cause in accordance with their community's principles of fairness.

Mr. White further argued that the bifurcation of his case materially prejudiced him because, had the jury heard Dr. Greene's "damages" testimony that the only way Mr. White could have been injured was to have been pulled from the barricade, the jury would have found for Mr. White on the causation issue.

7. The District Court Denial Of The Motion, And Mr. White's Appeal

On August 11, 1998, the trial court filed a Memorandum Opinion and Order, denying Mr. White's motion for new trial. (App. 22). The trial court's "main reason" for denying the motion was that its decision to bifurcate was sound because the liability and damages parts of the case involved different evidence and, "it would be a waste of everyone's time and the jury's time to hear evidence on damages if the jury found the defendants were not liable for the injuries in the first place." (App. 30). The trial court also took the position that its bifurcating "only 64%" of its cases demonstrates that it does not engage in "routine bifurcation" (App. 28) and that the court only sets a case for bifurcation at its initial scheduling conference at the outset of litigation following a "thorough review" of the file as it exists at that time. (App. 29).

Mr. White appealed to the Court of Appeals for the Third Circuit, arguing, *inter alia*, that if the court of

appeals upheld the trial court's philosophy that bifurcation is warranted wherever doing so might save everyone the time of having to sit through the damages case, it would be impossible to see how *any* case could ever *avoid* bifurcation. Mr. White noted that although it will always be the case that where a defendant wins liability, bifurcation will save time, the Federal Rules do not set up the type of two-tiered trial scheme legislated by the trial court. Mr. White also argued that, given the early stage at which the trial court decided to bifurcate the case, the trial court simply lacked the information necessary to assess the factors set forth in Rule 42(b).

8. The Court Of Appeals Decision

A three-judge panel of the court of appeals entered its "unreported – not precedential decision" on August 27, 1999. Writing for the panel was the Honorable Gustave Diamond, United States District Judge for the Western District of Pennsylvania, sitting by designation.

Based on an analysis that stretched on for almost two pages, the panel held that district court did not abuse its discretion in bifurcating the case. Initially, the panel accepted the trial court's explanation that it decided to bifurcate the case at the pretrial conference of June 1992 "only after reviewing the file and consulting with counsel." (App. 5). The panel dismissed Petitioner's argument that in June of 1992, there could have been no adequate record to bifurcate because the case was at the embryonic stage and the parties had not even begun to flesh out the damages evidence, issues and witnesses. The panel took the view that a trial court can somehow garner from the

pleadings alone all the information needed to decide bifurcation. (App. 7).

The court of appeals also stated that the trial court's initial decision to bifurcate was not "set in stone," and then *assumed* that in reaffirming its 1992 decision to bifurcate in 1997 and 1998, the trial court considered the parties' pretrial documents identifying liability and damages witnesses. (App. 7). The panel overlooked that the Petitioner's Pretrial Memorandum contained a lengthy explication of evidence supporting liability, so that bifurcating the case would likely not result in a shorter trial, but rather, in a longer, two-phase trial with dual opening statements and closing arguments. The court of appeals also overlooked a very telling piece of evidence that the trial judge was merely rubber-stamping his earlier decision to bifurcate the case, *to wit*, that in denying Mr. White's Motion to Reconsider, the trial court did not even wait to read the Respondents' briefs.[3]

On a more fundamental level, the panel simply ignored the point that judicial economy is not the ultimate purpose of the jury system and does not warrant bifurcating cases wherever doing so might result in a shorter trial due to the potential of not having to proceed to the damages phase.

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[3] As the docket sheet shows, Respondent Spectaguard's Memorandum on the bifurcation issue was not received until February 20th, three days *after* the February 17th phone conference and Order. Respondent SMI's opposing papers were received the day of the conference and order, but were not entered onto the docket until the day after.

Rather than squarely addressing the trial court's practice of bifurcating more than half of its cases, the panel rejected the evidence of that practice in its entirety as "unscientific," and then apparently accepted the trial court's view that a 64% bifurcation rate does not constitute routine bifurcation. (App. 6).

The court of appeals also failed to address the trial court's error in placing on Mr. White the burden of demonstrating "what that gets you" to have a normal, non-bifurcated trial, a practice squarely at odds with the established law placing the burden of justifying bifurcation on its proponent.

Finally, the court of appeals rejected Mr. White's argument that he was prejudiced by the bifurcation. The basis of the panel's holding on this issue was its irrational assumption that, although the trial court's primary reason for bifurcating the case was potentially to save time, the trial judge would likely have allowed Mr. White to play Dr. Greene's videotaped testimony (and Respondent's own physician's contrary testimony) had the trial court been asked. In so finding, the panel overlooked the fact that, although Mr. White's counsel pressed the trial court with Mr. White's need for the testimony of Dr. Greene both in writing and orally at the February 1998 telephone conference, the trial court never volunteered that Mr. White would be allowed to use Dr. Greene's testimony in the liability phase.

REASONS FOR GRANTING THE WRIT

1. Summary

Under the trial scheme established by the Federal Rules, bifurcation is the exception to the general rule providing for a unified trial of liability and damages issues. Consistently, a trial judge may bifurcate a case only after a thoughtful and detailed analysis of the case and a finding that bifurcation is necessary to promote the goals set forth in Fed. R. Civ. P. 42(b). A trial judge may not judicially legislate bifurcation as a routine practice. Stated otherwise, assembly-line bifurcation has no place in federal jurisprudence.

In violation of the above principles, the trial court in this case maintains a personal practice of bifurcating cases at their earliest stages without engaging in reasoned analysis and without reducing its reasoning to writing. The trial court's bifurcation of the instant case was done pursuant to that practice, rather than as a result of an informed analysis.

This Court should grant certiorari under Rule 10(a) of the Rules of the Supreme Court because the court of appeals sanctioned the trial court's practice of routinely bifurcating a large portion of its cases, a practice so far departing from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Additionally, this Court should grant certiorari under Rule 10(c) of the Rules of the Supreme Court because the court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, *to wit*, whether a trial court may

routinely bifurcate a substantial number of its cases without undertaking the reasoned analysis called for by Rule 42(b) of the Federal Rules of Civil Procedure.

The right to a full hearing of all issues material to one's cause belongs to every litigant in the federal court system. Accordingly, this case presents issues of importance to the public, and not merely to the parties herein. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), *cited in Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955).

2. Bifurcation Is The Exception To The General Rule Of A Unified Trial, Granted Only After Informed Analysis By The Trial Court

As the court of appeals itself has recognized in the past, although bifurcation is a matter entrusted to the discretion of the trial court, the discretion to bifurcate a case should be exercised only after a thoughtful review of the case and a resulting reasoned conclusion that the case is uniquely suited to bifurcation. *Lis v. Robert Packer Hospital*, 579 F.2d 819, 824 (3d Cir. 1978), *cert. denied*, 439 U.S. 955 (1978), *citing Idzojtic v. Pennsylvania Railroad Co.*, 456 F.2d 1228, 1230 (3d Cir. 1972). As emphasized by the court of appeals in *Lis*, "[a] general policy of a district judge bifurcating all negligence cases offends the philosophy that the decision must be made by a trial judge only as a result of an informed exercise of discretion on the merits of each case." 574 F.2d at 824.[4]

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[4] So opposed to the practice of routine bifurcation was the court of appeals in *Lis* that it warned that in future cases, it

The *Lis* case is consistent with the wealth of decisions and authorities recognizing bifurcation as a case-specific exception to the general rule of trying cases in their entirety. Thus, it has been stated that:

> The piecemeal trial of separate issues in a single lawsuit or the repetitive trial of the same issues in severed claims *is not to be the usual course.* Thus, Rule 42(b) should be resorted to only in the exercise of informed discretion when the court believes that separation will achieve the purposes of the rule.

9 C. Wright and A. Miller, *Federal Practice and Procedure, Civil 2d* § 2388 at 474 (1995) (emphasis added). Consistently, the Advisory Committee on Civil Rules prefaces its observation that bifurcation is appropriate where "experience has demonstrated its worth," with the proviso that, "separation of issues for trial is not to be routinely ordered." Advisory Committee Note to the 1966 amendment of Rule 42(b), 39 F.R.D. 113.

Most courts are in agreement. *Monaghan v. SZS 33 Assocs.*, 827 F. Supp. 233, 245 (S.D.N.Y. 1993); *State of Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978) (separation of issues is not the usual course that should be followed); *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1323-24 (5th Cir. 1976) (same); *Marisol v. Giuliani*, 929 F. Supp. 662, 693 (S.D.N.Y.

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might not require a showing of prejudice to justify a new trial where a trial court engages in routine bifurcation and fails to support its decision, "with an explication demonstrating its exercise of an informed discretion in the circumstances of the case." 579 F.2d at 825.

1996) (bifurcation is appropriate only in exceptional circumstances); *Keyes Fibre Co. v. Packaging Corp. of America*, 763 F. Supp. 374, 375 (N.D. Ill. 1991) (notwithstanding its discretion under Rule 42(b), a court should not routinely order separate trials); *Kimberly-Clark Corp. v. James River Corp. of Virginia*, 131 F.R.D. 607, 608 (N.D. Ga. 1989) ("court should remain mindful of the traditional [role] of the fact finder; i.e., to make an ultimate determination on the basis of a case *presented in its entirety*"). *Accord Laitram v. Hewlett-Packard Co.*, 791 F. Supp. 113, 114 (E.D. La. 1992) (the court is expected to exercise its discretion on a case-by-case basis); *Spearman v. Delco Remy Div. of General Motors Corp.*, 717 F. Supp. 1351, 1361 (S.D. Ind. 1989); *Illinois v. Borg, Inc.*, 564 F. Supp. 102, 105 (N.D. Ill. 1983); *Temp-Resisto Corp. v. Glatt*, 18 F.R.D. 148, 152 (D.N.J. 1955); *Frasier v. Twentieth Century-Fox Film Corp.*, 119 F. Supp. 495 (D. Neb. 1954); *Ingram Corp. v. J. Ray McDermott & Co.*, 495 F. Supp. 1321, 1333 (E.D. La. 1980) (*quoting* Wright & Miller, *supra*).

Consistent with the above, Rule 42(b) expressly limits the discretion of the trial courts to bifurcate trials only where doing so will (1) promote the convenience of the parties, (2) avoid prejudice or (3) be conducive to expedition and economy.

If bifurcation is the exception to the rule and may only be granted after the trial court engages in a reasoned, case-specific analysis, it is axiomatic that the trial court must have a sufficiently developed record to undertake that analysis. *See Fairchild Stratos Corp. v. General Electric Corp.*, 31 F.R.D. 301 (S.D.N.Y. 1962) (defense motion for bifurcation of liability and damages issues at the outset of discovery held premature):

> Plaintiff suggests that the motion for separate trials, which was heard [early in the discovery process] has been made prematurely. On the bare record presently before the Court, plaintiff's contention is well taken. Whether economy and equity would dictate a single or separate trials cannot be determined at this early stage.

31 F.R.D. at 302.

3. The Burden Is On The Party Seeking Bifurcation

Because bifurcation is the exception to the general rule, the burden on the bifurcation issue does not rest on the party seeking to avoid bifurcation. Rather, the burden is on bifurcation's proponent to prove that bifurcation is justified by the facts of the case. *Reading Tube Corp. v. Employers Ins. of Wausau*, 944 F. Supp. 398, 404 (E.D. Pa. 1996); *Ake v. General Motors Corp.*, 942 F. Supp. 869, 877 (W.D.N.Y. 1996); *Home Elevators, Inc. v. Millar Elevator Serv. Co.*, 933 F. Supp. 1090 (N.D. Ga. 1996); *State of Ohio ex rel. Montgomery v. Louis Trauth Dairy, Inc.*, 163 F.R.D. 500, 504 (S.D. Ohio 1995); *Corrigan v. Methodist Hospital*, 160 F.R.D. 55 (E.D. Pa. 1995); *Spectra-Physics Lasers, Inc. v. Uniphase Corp.*, 144 F.R.D. 99, 101 (N.D. Cal. 1992).

4. Bifurcation Interferes With The Jury's Traditional Charge Of Deciding An Entire Cause Consistent With Community Values

The law's employment of bifurcation only as the rare exception is consistent with the jury's traditional task of deciding an entire cause in accordance with its community's sense of fairness. Thus, it has been observed that:

> The jury, as we know it, is not designed solely to resolve issues of fact on a rational basis – making findings to be utilized according to rules of substantive law determined by a judge to reach a legal result. . . . The jury is nurtured as an institution for deciding legal disputes in a way that litigants and the community find acceptable. The jury responds without any feeling of guilt, in a way that the trained judge cannot – or should not – to the immediate community sense of fairness as well as to rules of law and the logic of evidence.
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>
> . . . Built into the substantive law of negligence, contributory negligence and cause are the *flexible standards* of the reasonable man and his foresight.

Jack B. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 Vand. L. Rev. 831, 832-33 (1961). *See also* J. Granholm & W. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. Tol. L. Rev. 505 (1995) ("Advanced under the guise of judicial efficiency and logic, [devices such as bifurcation] prevent a jury from bringing to the 'recipe' of justice the very ingredient we expect from them – namely a leavening of the rigidity of rules of law").[5]

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[5] It is interesting to note in this regard that many standard jury instructions direct jurors to apply their "common sense" and "experience." Granholm & Richards, *supra* at 510 n. 20. *See* Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions, Civil and Criminal 1*, (4th ed. 1992) § 12.02 ("You are expected to use your good sense in considering and evaluating the evidence in this case for only those purposes for which it has been

Another commentator discusses the various ways that juries depart from the strict legal formulas to reach verdicts based on community values and how, in doing so, juries perform the valuable function of implementing, on a case-by-case basis, equities that are too subtle or too difficult to legislate and codify on an across-the-board basis. Kalvern, *supra*, *quoting Fuentes v. Tucker*, 31 Cal.2d 1, 187 P.2d 752 (1947) (Carter, J., concurring).

In *Lis*, the court of appeals recognized that separating liability and damages would interfere with the traditional flexibility afforded to juries:

> It can reasonably be suspected that the degree of negligence, the contributory negligence of the plaintiff, and other conduct of the parties are presently reflected, with many juries, in the finding of damages as well as the finding of liability. To a purist it probably would seem desirable to put an end to this, but it may be argued that this lends *a beneficial flexibility* to the strict rules of liability and contributory negligence.

579 F.2d at 824 (emphasis added).[6]

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received and to give such evidence a reasonable and *fair* construction *in the light of your common knowledge or the natural tendencies and inclinations of human beings.*") (emphasis added).

[6] It has been pointed out that in the Advisory Committee Note submitted with the 1966 amendment to Rule 42(b), one member of the Advisory Committee suggested that the Advisory Committee purposely took no position on severing liability and damages in the civil context while approving its customary use in admiralty cases because of Weinstein's view that such severance prevented the jury's "tempering" of the substantive law with a social conscience. Albert P. Bedcarre, Note, *Rule 42(b) Bifurcation At An Extreme: Polyfurcation of*

In order to reach decisions that are consistent with community values and expectations, juries must be allowed to hear cases *in their entirety*, and the law has traditionally empowered them to do so. Bifurcation infringes on that aspect of the jury's role:

> In considering [whether to bifurcate], *the court should remain mindful of the traditional [role] of the factfinder; i.e., to make an ultimate determination on the basis of a case presented in its entirety*. Because bifurcation works an infringement on such an important aspect of the judicial process, courts are "cautioned that [it] is not the usual course that should be followed."

Kimberly-Clark Corporation v. James River Corporation of Virginia, 131 F.R.D. 607, 608 (N.D. Ga. 1989) (emphasis added), *quoting Response to Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1323-24 (5th Cir. 1976) (*quoting Swofford v. B&W, Inc.*, 336 F.2d 406, 415 (5th Cir. 1964).[7] *See also* Granholm & Richards, *supra* at 513 ("Those who advocate the routine use of procedural devices, such as bifurcation, . . . assume that issues in a given case are dry, technical and easily detachable. Moral

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Liability in Environmental Tort Cases, 17:123 Bost. Col. Env. Aff. L. Rev. 128 n. 32 (1989), *citing* C. Wright, *The Federal Courts a Century After Appomattox*, 52 A.B.A.J. 742, 747 (1966).

[7] In the discussions on the Federal Rules that took place before their adoption, Judge (then Dean) Clark, stated that the federal rules are "based on the theory that it is a sound and a desirable thing that all spots of irritation between the parties should be brought out into the open and should be fought over and disposed of at one time." ABA, Proceedings of Washington Institute on the Federal Rules 58 (1938).

questions of intent and fault, however, *beg for context* and defy attempts at pigeon-holing.").

5. Bifurcation Changes The Nature And Outcome Of Jury Trials

Many commentators agree that by interfering with the jury's ability to decide cases in their entirety, bifurcation affects the nature and outcome of jury trials. 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2390 (1995) ("bifurcation makes a substantial change in the nature of the jury trial itself."). *See generally* Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies in The Courts, The Public, and the Law Explosion* 29 (Harry W. Jones, ed. 1965); Harry Kalvern Jr., *The Jury, the Law and the Personal Damage Award*, 19 Ohio St. L.J. 158 (1958); Brault, *The Issues of Liability and Damages in Tort Cases Should Not be Separated for the Purposes of Trial*, ABA Ins. Neg. & Compensation Sec. 274 (1960); J. Granholm & W. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. Tol. L. Rev. 505 (1995). *Accord*, *Lis, supra*, 579 F.2d at 824 ("separate trials of liability and damages would differ from a single trial in more than one form.").

6. Bureaucratic Efficiency Does Not Justify Routine Bifurcation

As stated above, the trial court's primary basis for bifurcating the case appears to be its hope that if the jury found against Mr. White as to liability, there would be no need for damages evidence. However, even if bifurcation

sometimes promotes judicial efficiency, bureaucratic goals are not the ultimate purpose of the jury system, and do not justify judicial legislation of a two-tiered trial regime.[8] *See H.B. Fuller Co. v. National Starch & Chem. Corp.*, 595 F. Supp. 622, 625 (D. Del. 1984) ("It is true of any case that a separate trial on a dispositive issue might save some time and energy; however, that fact has not led to the routine bifurcation of trials for the simple reason that judicial economy is not the be all and the end all of the administration of justice.").

As one commentator reasoned:

> When it is seen that the split trial reduces by more than half the cases in which personal injury plaintiffs are successful, *it is apparent that the new procedure (bifurcation) has made a substantial change in the nature of the jury trial itself.* If

---

[8] That bifurcation affects efficiency is itself questionable. Thus, it has been recognized that, " '[a] single trial will generally lessen the delay, expense and inconvenience to the parties and the courts.' " *Corrigan v. Methodist Hospital, et al.*, 847 F. Supp. 657 (E.D. Pa. 1995), *quoting*, J.W. Moore, 5 *Moore's Federal Practice*, ¶42.03[1], at pp. 42-43 (1994); and *citing Laitram Corp. v. Hewlett-Packard Co.*, 791 F. Supp. 113, 115 (E.D. La. 1992). *Accord Johns Hopkins Univ. v. Cellpro*, 160 F.R.D. 30 (D. Del. 1995); *BV v. Apollo Computer*, 707 F. Supp. 1429, 1433 (D. Del. 1989); *Lowe v. Philadelphia Newspapers, Inc.*, 594 F. Supp. 123, 125 (E.D. Pa. 1984) ("the party seeking bifurcation has the burden of showing that bifurcation is proper in light of the general principle that a single trial tends to lessen the delay, expense and inconvenience to all parties"); *R.E. Linder Steel Erection Co. v. Wedemeyer, Cernick, Corrubia, Inc.*, 585 F. Supp. 1530, 1534 (D. Md. 1984) ("the court believes that any savings in time and expense which might result from a bifurcation is wholly speculative.").

> this is to be done, and if the Constitution permits it to be done, the change should come from those who are elected to make laws, with full awareness of what they are doing. *It should not come under the guise of an attack on court congestion from those of us who are mere technicians, whose function it is to make the gears operate smoothly.*

Charles A. Wright, *Procedural Reform: Its Limitations and Its Future*, 1 Ga. L. Rev. 563, 569 (1967) (emphasis added). Consistently, the Honorable Judge Weinstein has observed that courts "ought not force substantive changes on the parties merely on the justification of existing delays in the court." Weinstein, *supra*, at 853.

CONCLUSION

For the foregoing reasons, Petitioner Timothy M. White, by his undersigned counsel, respectfully requests the Court to grant his petition for certiorari.

Respectfully submitted,

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UNREPORTED – NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1782

TIMOTHY M. WHITE,

Appellant,

v.

SMI OF PATTISON AVENUE, L.P.; ELECTRIC FACTORY CONCERTS, INC.; CITY OF PHILADELPHIA; SPECTAGUARD, INC.; SPECTRUM, LTD.; SPECTACOR, INC.; SPECTACOR FACILITIES CORP.; SMI PARTNERSHIP a/k/a SPECTACOR MANAGEMENT GROUP a/k/a SPECTACOR MANAGEMENT LIMITED PARTNERSHIP; PATTISON FACILITIES CORP.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. No. 92-1724
(Honorable Charles R. Weiner)

Argued: July 28, 1999

Before: STAPLETON and SCIRICA, *Circuit Judges*
and DIAMOND, *District Judge**

(Opinion Filed August 27, 1999)

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* The Honorable Gustave Diamond, United States District Judge for the Western District of Pennsylvania, sitting by designation.

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MEMORANDUM OPINION

DIAMOND, *District Judge*

Timothy White filed a complaint in the district court on March 24, 1992, seeking recovery for injuries suffered when, while attending a rock concert at the Spectrum Arena in Philadelphia on April 6, 1990, he fell from the

stage barricade during an altercation with security personnel. The complaint asserted that defendant/appellees SMI of Pattison Avenue, L.P. and SpectaGuard, Inc. vicariously were liable, under *respondeat superior*, for the negligent acts of the security guards involved in the incident and that SMI and SpectaGuard directly were liable for negligently failing to train those security guards.

The district court bifurcated the liability and damages phases of the trial. The liability phase was tried to a jury on March 2-5, 1998. The jury's verdict consisted of answers to interrogatories by which the jury found that the security guards were negligent and that SMI and SpectaGuard negligently had failed to train the guards properly, but that neither instance of negligence was a substantial contributing factor to White's injuries.

White moved for a new trial arguing that (i) the court's decision to bifurcate materially prejudiced White's case and was not arrived at through the exercise of informed discretion as contemplated by Fed.R.Civ.P. 42(b) and (ii) the court failed to instruct the jury properly on multiple causation, and (iii) the court improperly prohibited one of White's expert witnesses from testifying that the defendants' inadequate training program was a substantial contributing factor to White's injuries. The motion for a new trial was denied and White filed this appeal. We will affirm the district court's denial of Appellant's motion for a new trial.[1]

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[1] The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332 and this court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

We review the district court's denial of the motion for a new trial, bifurcation order and exclusion of expert witness testimony for abuse of discretion. *See, e.g., Barr Laboratories, Inc. v. Abbott Laboratories.*, 978 F.2d 98, 105 (3d Cir. 1992) (bifurcation); *Hines v. Consolidated Rail Corp.*, 926 F.2d 262, 267 (3d Cir. 1991) *and Idzojtic v. The Pennsylvania Railroad Co.*, 456 F.2d 1228, 1230 (3d Cir. 1972) (expert testimony); *Olefins Trading, Inc. v. Han Yang Chem Corp.*, 9 F.3d 282, 289-90 (3d Cir. 1993) (new trial). The standard of review on appeal regarding jury instructions depends upon whether appellant properly preserved the objection under Fed.R.Civ.P. 46 and 51. *See generally Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 275 (3d Cir. 1998). Where the objection properly is preserved, the inquiry is whether the charge, "taken as a whole, properly apprises the jury of the issues and the applicable law." *Id.* at 275 (*quoting Limbach Co. v. Sheet Metal Workers Int'l Assn., AFL-CIO*, 949 F.2d 1241, 1259 n. 15 (3d Cir. 1991) (*en banc*)). Where the objection has been waived, the power to review is discretionary and should be exercised sparingly. *Id.* If the court chooses to exercise the discretion, the court may only reverse where the error is fundamental and highly prejudicial or if the instructions are such that the jury was without adequate guidance on a fundamental question and failure to consider the error would result in a miscarriage of justice. *Id.* at 275-76 (*citing Fashauer v. New Jersey Transit Rail Operations Inc.*, 57 F.3d 1269, 1289 (3d Cir. 1995)).

I. Bifurcation

White contends that the district court's decision to bifurcate the case was not the result of the exercise of the informed discretion under Fed.R.Civ.P. 42(b)[2] required by *Lis v. The Robert Packer Hospital*, 579 F.2d 819 (3d Cir.), *cert. denied*, 439 U.S. 955 (1978), but rather was an instance of the courts routine practice of bifurcating cases. White asserts further that he is not required to demonstrate prejudice if the bifurcation was undertaken pursuant to such a routine practice. *Lis*, 579 F.2d at 825. He also takes issue with the courts resolution of the bifurcation issue without a contemporaneous written opinion, and presses this court to adopt a rule reversing any bifurcation decision that is not accompanied by a contemporaneous written opinion. White claims that he was prejudiced because the bifurcation prevented him during the liability phase from playing a portion of the videotaped testimony of Dr. Greene, his medical damages' expert, which addressed the cause of White's injuries.

In denying the motion for a new trial, the district court explained that it initially decided to bifurcate the case into liability and damage phases only after reviewing the file and consulting with counsel at a pretrial conference held June 1, 1992. *White v. SMI of Pattison Avenue, L.P., et al*, C.A. No. 92-1724, Memorandum Opinion and Order dated August 11, 1998 ("Mem.Op."), at p.

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[2] Fed.R.Civ.P. 42(b) provides in relevant part that the "court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any, claim. . . . "

3. Appellant was represented by different counsel at that time, but during a telephone conference call with present counsel on December 9, 1997, the court reiterated its bifurcation ruling and Appellant's present counsel objected. The court overruled the objection, finding that bifurcation was proper because there was no serious dispute that White had been injured, but that liability was hotly contested and the evidence and witnesses for liability and damages were completely separate. Mem.Op. at 3, 9. White's motion for reconsideration of the bifurcation decision was denied by the district court during a telephone conference call on February 18, 1998. Nevertheless, White was permitted to introduce evidence concerning the nature of his injuries during the liability phase of the trial. *Id.*

Nothing in the record establishes that the trial judge had a routine practice of bifurcating personal injury or any other types of cases. White's only support for this contention is an unscientific review, conducted by his counsel's paralegal, of cases identified as pending before the trial judge in the *Legal Intelligence* for the period from January, 1997 through March, 1998. Of the 64 cases reviewed, 45 cases were actual or potential jury trial cases where the plaintiff sought damages; of those 45 cases, 29, or 64%, had been earmarked for bifurcation. The raw data generated by this review does not support the contention that the trial judge routinely bifurcated cases, and appellant's counsel admitted at oral argument that he was unaware of any of the details or reasons underlying the bifurcation decisions in the reviewed cases. We are not persuaded by White's argument that the trial court could not have evaluated the Rule 42(b) factors in June of 1992

because the case was then in its embryonic stages. The district court certainly could have evaluated the Rule 42(b) factors in light of information available from the pleadings at that time. In any event, the initial bifurcation decision was not set in stone; it was reconsidered in late 1997 and early 1998, after the parties' pretrial documents identifying liability and damages witnesses were available for review. In summary, the record reflects that the district court evaluated the factors set forth in Fed.R.Civ.P. 42(b) and that its decision to bifurcate the trial between liability and damages was the product of an informed exercise of discretion.

Finally, White has failed to demonstrate that he was prejudiced by the bifurcation decision. *See, e.g., Barr Laboratories,* 978 F.2d at 115 ("Barr is not entitled to rely upon the *Lis dicta* to excuse its failure to demonstrate prejudice resulting from the bifurcation to which it objects."); *Franklin Music Co. v. American Broadcasting Cos., Inc.*, 616 F.2d 528, 538 (3d Cir. 1979) (court is unpersuaded by appellant's claim of prejudice arising from a bifurcation decision). White's sole allegation of prejudice relates to his alleged inability to present Dr. Greene's testimony concerning the cause of White's injury during the liability phase of the trial. It is undisputed, however, that the district court's ruling on White's objection to bifurcation did not include a ruling that White could not present any portion of Dr. Greene's testimony which was relevant to the liability issue. Appellant's counsel admits, moreover, that Dr. Greene was not identified as a liability witness in his pretrial statement and further that counsel did not seek to submit any part of the videotaped testimony

during the liability phase. In his motion for reconsideration of the bifurcation decision, appellant's counsel argued against bifurcation on the ground, *inter alia*, that it would be duplicative to play the relevant portion of Dr. Greene's testimony during both phases of the trial. (A. 78). Thus, the record reflects that the district court had given counsel no reason to believe that he would be precluded from submitting Dr. Greene's testimony during the liability phase of the trial. Having failed to make even a proffer of Dr. Greene's testimony during the liability phase of the trial, White cannot now claim prejudice from its omission solely because the trial was bifurcated.

II. Multiple Causation Jury Instruction

White contends that, in light of the conflicting testimony concerning the altercation with the security guards, a reasonable jury could have concluded that White and the security guards all substantially contributed to White's dropping from the barricade and suffering injury. The district court's charge to the jury consisted of standard Pennsylvania jury instructions on negligence, contributory and comparative negligence and causation, and appellant's counsel lodged no objections to those instructions prior to the jury's retiring to deliberate.

During its deliberations, the jury submitted a written question to the court, which the court addressed as follows in the presence of counsel.

> THE COURT: Let me answer your next question. We need – "Clarification: According to Count I, Question II – We need clarification of what all encompasses "causing the

incident," definition of – parameters of – beginning/end."

The best I can give you is what I gave you earlier about proximate cause.

Even though the guards might have been found by you to have acted negligently as to the plaintiff, plaintiff cannot recover on this fact alone, unless you, ladies and gentlemen of the jury, also find that this negligence was the proximate cause of the accident. Proximate cause means that there must be a sufficient causal connection between the act or omission of a defendant and the accident. An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing the/accident, that is, if the accident was a reasonable forseeable [sic] consequence of the defendants act or omission. A substantial factor is an actual, real factor, although the result may be unusal [sic] or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the accident.

Does that answer your question?

JUROR NO. 1: Yes.

* * *

(The jury exited the courtroom to continue deliberations.)

THE COURT: An act or omission. A substantial factor is an actual, real factor that may be real and unexpected.

Proximate means there must be a causal connection and they said that answered their question.

> MR. MYERS: That emphasizes the substantial part of it, but the problem is there is another standard instruction that talks about you can have two substantial causes of an accident. I would like them to be instructed to that part. They may be thinking if we find Mr. White substantially contributed, we can't find Mr. Collins substantially contributed. I think we can say they both contributed.

A. 167-170.

Giving White the benefit of the doubt that he preserved this issue for appeal, even though Fed.R.Civ.P. 51 requires that objections to a jury instruction be made prior to the time the jury retires to deliberate, the standard of review is whether the charge, taken as a whole, properly apprises the jury of the issues and the applicable law. *Smith*, 147 F.3d at 275 (*citing Limbach*, 949 F.2d at 1259 n.15). The jury instructions relating to negligence, contributory and comparative negligence and causation, taken as a whole, fairly apprised the jury that more than one actor's negligence could be a substantial contributing factor to White's injuries. (A. 144-49). Specifically, in instructing on comparative negligence, the district court charged the jury that "[u]nder this act, if you find that any defendant or more than one defendant was causally negligent, and you find that plaintiff also was causally negligent, it is your duty to apportion the relative degree of causal negligence between all of the defendants found negligent and the plaintiff." (A. 148). Moreover, in instructing the jury concerning the special interrogatories they would have to complete in order to arrive at their verdict, the district court further specifically instructed the jury that:

> [t]aking the combined negligence that was a substantial factor in bringing about the accident as 100%, what percentage of the causal negligence was attributable to the security guards and what percentage was attributable to the plaintiff? Answer only as to those security guards whom you found were negligent and whose negligence substantially contributed to the accident.
>
> Percentage of causal negligence attributable to security guards. Percentage of causal negligence attributable to plaintiff. That's a number you have to put down. Percentage of causal negligence attributable to plaintiff. That requires a number. It has to equal 100%.
>
> If you found the plaintiffs causal negligence to be greater than 50%, then the plaintiff can't recover for negligence.

(A. 157-58).

The jury instructions taken as a whole fairly apprised the jury of the issues and the applicable law, particularly the law relating to multiple causation, and fairly instructed them that more than one actor's negligence could be a substantial contributing factor to White's injuries. The district court's refusal to give an additional, duplicative charge on the issue of causation will be affirmed.

III. Preclusion of Expert Testimony

Appellant asserts that the court erred when it refused to allow his liability expert, Mr. Terrence Gibbs, to give his opinion that the inadequacy of the training program

was. a substantial contributing factor to White's injury. Mr. Gibbs testified at length concerning specific shortcomings in SMI and SpectaGuard's training materials and procedures, before the following colloquy:

> Q. Do you have an opinion with reasonable certainty as to whether the inadequacy of the training program was a substantial contributing factor to Mr. White's *injury*?
>
> MR. HOSMER: Objection.
>
> THE COURT: I will sustain the objection.
>
> Let's go on, please.
>
> A. 138 (emphasis added).

Citing Fed.R.Evid. 704(a), White argues that the court erred in sustaining the objection and that such error prejudiced his case as evidenced by the jury's finding that the negligent failure to train was not a substantial contributing factor to White's injuries. In denying White's motion for a new trial, the district court ruled that White had failed to preserve this issue and in any event, relying on the Advisory Committee note to Fed.R.Evid. 704(a) and *Hygh v. Jacobs*, 961 F.2d 359, 364 (2d Cir. 1992), that it was proper to exclude the testimony because it merely told the jury what result to reach. Mem.Op. at 16-17.

As an initial matter, it appears that White did preserve his right to assert this issue in his motion for a new trial and to appeal the district court's ruling. Fed.R.Evid. 103(a)(2) provides in relevant part that "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and . . . (2) offer of proof – in case the ruling is one

excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." Fed.R.Evid. 103(a)(2). It would appear from the straightforward content of the question, and the context in which it was asked, that the substance of the testimony was apparent to all concerned and therefore that a specific offer of proof was not required to preserve appellant's right to predicate error on the court's ruling.

The original advisory committee note to Rule 704(a), upon which the district court relied in part, provides that:

> The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day.

Fed.R.Evid. 704, Advisory Comm. Note. Although we may take issue with an evidentiary ruling excluding expert testimony wholly on the basis that the expert would thereby merely be telling the jury what result to reach,[3] we believe the court's ruling with respect to the particular question at issue before us was correct for the fundamental reason that Mr. Gibbs was not qualified to

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[3] *See, e.g., In re Japanese Elec. Prods. Antitrust Litigation*, 723 F.2d 238, 278 (3d Cir. 1983) ("to the extent that the trial court's discussion suggests that expressions of opinion on the ultimate fact in issue somehow impermissibly invade the province of the jury, . . . it is inconsistent with the clear mandate of Rule 704.").

provide an expert opinion on the cause of White's injury. Fed.R.Evid. 702 provides that expert testimony is admissible only if the witness is "qualified as an expert by knowledge, skill, experience, training or education." Fed.R.Evid. 702; *see also Compagnie Des Bauxites De Guinee v. Insurance Co. of North America*, 721 F.2d 109, 116-17 (3d Cir. 1983). Appellant's counsel asked Mr. Gibbs to provide expert testimony concerning a substantial contributing factor *to White's injury*. As White's injury was a broken neck, only a qualified medical expert could opine as to a cause of that injury. Nothing in the record indicates that Mr. Gibbs, White's expert on security procedures, was qualified to provide expert *medical* testimony.

Even were the court to overlook this fatal flaw and treat counsel's question to Mr. Gibbs as relating to whether the failure to train was a substantial contributing factor to the incident, *i.e.* to White's falling from the stage barricade, as counsel for appellant framed the issue in his brief and at oral argument, we still would conclude that excluding the testimony was proper. As indicated above, Mr. Gibbs was permitted to testify at length concerning specific shortcomings in the training materials and procedures. A. 128-139. He further was permitted to opine that SMI and SpectaGuard's program for security was unreasonable (A. 137) and that a safe and reasonable security program would not teach security guards to grab an individual around the neck, from behind, and lift him over the stage barricade. (A. 138-39). Moreover, the jury did find that SMI and SpectaGuard had negligently failed properly to train the security guards. An opinion from

Gibbs that the inadequate training program was a substantial contributing factor to the incident would have provided no additional guidance to the jury beyond that supplied by Gibbs' other testimony. The sustaining of the objection by the district court was therefore proper. *See, e.g., In re Japanese Elec. Prods. Antitrust Litigation*, 723 F.2d at 278 (controlling standard on admissibility is whether the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue); *see also Linkstrom v. Golden T. Farms*, 883 F.2d 269, 270 (3d Cir. 1989) (helpfulness to the trier of fact is the touchstone of admissibility of expert witness testimony).

Because the district court properly resolved each issue raised by White in his motion for a new trial, the district court did not abuse its discretion in denying that motion and its decision will be affirmed.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

/s/ Gustave Diamond
United States
District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1782

TIMOTHY M. WHITE,

Appellant,

v.

SMI OF PATTISON AVENUE, L.P.; ELECTRIC FACTORY CONCERTS, INC.; CITY OF PHILADELPHIA; SPECTAGUARD, INC.; SPECTRUM, LTD.; SPECTACOR, INC.; SPECTACOR FACILITIES CORP.; SMI PARTNERSHIP a/k/a SPECTACOR MANAGEMENT GROUP a/k/a SPECTACOR MANAGEMENT LIMITED PARTNERSHIP; PATTISON FACILITIES CORP.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. No. 92-1724
(Honorable Charles R. Weiner)

Argued: July 28, 1999

Before: STAPLETON and SCIRICA, *Circuit Judges*
and DIAMOND, *District Judge**

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* The Honorable Gustave Diamond, United States District Judge for the Western District of Pennsylvania, sitting by designation.

JUDGMENT

This case came on to be heard on the record before the United States District Court

_____

for the Eastern District of Pennsylvania and was argued on July 28, 1999,

On consideration whereof, it is ORDERED AND ADJUDGED by this court that the Order of the district court entered August 11, 1998, be, and the same hereby is, affirmed.

Costs taxed against appellant.

ATTEST:

/s/ Illegible
CLERK

Dated: August 27, 1999

PRE-TRIAL REPORT AND ORDER

DATE PRE-TRIAL HELD: 6/1/82 NO: 77-1724

CASE CAPTION: Prieta
v.
D. Reid

1. TRIAL COUNSEL FOR PLAINTIFF: John J. O'Brien, Jr.
FOR DEFENDANT: Richard J. Watson
FOR DEFENDANT: ~~[illegible]~~ Harold Van Horner
Joan Richter

2. STATUS OF CASE:

Dismissed w/o prejudice
Parties to contact the court ~~in [illegible]~~ 6/2/82; ~~2:30~~ 11:00
Pl to supply complete med. file and submit to Dft.
All exhibits to be premarked. Parties will exchange expert C.V.'s

3. TRIAL DATE: bifurcated

4. JURY/NON-JURY

5. PRE-TRIAL MEMOS. AND POINTS FOR CHARGE OR PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
PLAINTIFF:
DEFENDANT(S):

NOTE: ALL DOCUMENTS, PHOTOS, ETC. ARE TO BE MARKED BEFORE TRIAL AND COPY TO BE GIVEN TO OPPONENTS OR OPPONENTS TO BE ALLOWED TO COPY.

POINTS FOR CHARGE ARE TO BE SUBMITTED IN DUPLICATE - EACH POINT ON A SEPARATE PAGE.

Copy forwarded to counsel above listed.

SO ORDERED:

Charles R. Weiner

CHARLES R. WEINER, J.

A-32

App. 18

BEST AVAILABLE COPY

PRETRIAL REPORT AND ORDER

DATE PRETRIAL HELD: 6/1/92 NO. 92-1724

CASE CAPTION: WHITE
V
SMI

1. TRIAL COUNSEL

FOR PLAINTIFF: JOHN O'BRIEN, JR.
FOR DEFENDANT: JOAN RIGHTER
FOR RICHARD HOLLSTEIN
FOR DEFENDANT: E. CHANDLER HOSMER

2. STATUS OF CASE: DISMISSED WITHOUT PREJUDICE. PARTIES TO CONTACT THE COURT 8/3/92 AT 10:00. PLAINTIFF TO SUPPLY COMPELTE [sic] MEDICAL FILE AND SUBMIT TO INDEPENDENT MEDICAL EXAMINATION. ALL EXHIBITS TO BE PRE-MARKED. PARTIES WILL EXCHANGE EXPERT C.V.'S.

3. TRIAL DATE:

4. JURY/NONJURY

5. PRETRIAL MEMOS. AND POINTS FOR CHARGE OR PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

PLAINTIFF:
DEFENDANT(S)

NOTE: ALL DOCUMENTS, PHOTOS, ETC. ARE TO BE MARKED BEFORE TRIAL AND A COPY GIVEN TO OPPONENT(S), OR OPPONENT(S) BE ALLOWED TO COPY THEM.

POINTS FOR CHARGE ARE TO BE SUBMITTED IN DUPLICATE – **EACH POINT ON A SEPARATE PAGE.**

Copy forwarded to counsel listed above.

SO ORDERED:

/s/ Charles R. Weiner
CHARLES R. WEINER

FRP

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIMOTHY M. WHITE,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
SMI OF PATTISON AVENUE, L.P., And SPECTAGUARD, INC.,	:	
Defendants.	:	NO. 92-1724

FILED FEB 18 1998

App. 21

ORDER

AND NOW, this 17th day of February, 1998, upon consideration of Plaintiff's Motion For Reconsideration of the Court's Decision *Sua Sponte* to Order Bifurcation, and any opposition thereto, IT IS HEREBY ORDERED that the Motion is DENIED AS PER CONFERENCE CALL WITH ALL COUNSEL & THE COURT ~~GRANTED and that the liability and damages portions of this case shall be tried together~~

BY THE COURT:

Charles R. Weiner
J.

ENTERED: 2-18-98

CLERK OF COURT

A-95

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIMOTHY M. WHITE

VS. C.A. NO. 92-1724

SMI OF PATTISON AVENUE, L.P.,
and SPECTAGUARD, INC.

MEMORANDUM OPINION AND ORDER

WEINER, J. AUGUST 11, 1998

Plaintiff brought this action for injuries he allegedly sustained at a Motley Crue concert at the Spectrum on April 6, 1990 when security guards working for the defendants allegedly dragged him backwards over a barricade and dropped him to the ground causing plaintiff to suffer a broken neck. Plaintiff claimed the defendants were negligent under a theory of respondeat superior for the negligent and intentional acts of the security guards and that the defendants were negligent for failing to properly train and supervise the security guards.

Defendants contended that plaintiff fell from the barricade due to his own disruptive and dangerous actions in attempting to resist the security guards. Specifically, defendants contended that during the concert plaintiff repeatedly positioned himself on the four foot high barricade which separated the crowd from the stage and the performers despite repeated directives from security guards to get down and return to his seat. The guards believed plaintiff was attempting to "rush" the stage and start a riot. One guard contended that after he asked plaintiff to get down from the barricade for the final time, plaintiff punched him in the mouth. Defendants also

contended that plaintiff had been drinking heavily prior to the concert and that, hours after the incident, plaintiff tested positive for the presence of cocaine in his system. Defendants also contended that plaintiff's neck was already in a fragile condition as the result of an incident which occurred about one year prior to the concert when plaintiff, while under the influence of alcohol, failed in his attempt to jump across an eight foot opening at a construction site and suffered serious neck injuries.

The court extended itself to give plaintiff a fair trial by excluding, at plaintiff's request, all evidence and arguments concerning the presence of cocaine in plaintiff's system on the night of the incident (which appeared in the hospital report), plaintiff's prior criminal record, as well as any evidence and arguments concerning plaintiff's prior injuries (which were similar to those alleged in his complaint). Plaintiff's counsel repeatedly admitted during the trial that plaintiff was legally drunk at the time of the incident with a blood alcohol level of .22. Instead of focusing on the many weaknesses in his case, plaintiff's counsel seeks to cite the court's decision to bifurcate the trial as the reason for the jury's verdict. In all the years of this court's practice, no counsel has ever raised this issue in a post-trial motion with the court.

Although the incident took place on April 6, 1990, plaintiff's counsel at the time did not file suit until March 24, 1992. At a pretrial conference on June 1, 1992, the Court stated that trial of this matter would be bifurcated between liability and damages since defense counsel contested only liability and not damages. On April 5, 1993,

plaintiff's counsel withdrew his appearance and plaintiff's current counsel entered his appearance. Both counsel were from the same law firm. Incredibly, it took plaintiff's counsel from April of 1993 to March of 1998 to prepare this case for trial. Indeed, the docket reflects absolutely no activity by plaintiff's counsel from the date he entered his appearance until March 27, 1995 when he filed a motion to compel discovery. Another two and one half years passed before plaintiff's counsel notified the court that he was finally ready for trial.

During a telephone conference with counsel on December 9, 1997, the Court reiterated, over the objection of plaintiff's counsel, its previous ruling that the trial would be bifurcated between liability and damages. The Court noted that there was no dispute as to the plaintiff's injuries but that defendants vigorously disputed liability. During the conference, the court asked plaintiff's counsel what prejudice he would suffer from having the trial bifurcated. Counsel's main objection seemed to be that he had lost a liability verdict in a prior bifurcated case. The court did tell plaintiff's counsel that he would be allowed to tell the jury about the injuries that plaintiff had sustained and the consequences that followed. The Court also told plaintiff's counsel that the same jury would hear damages if they found in favor of plaintiff on liability.

Plaintiff's counsel filed a motion to reconsider the bifurcation ruling which the Court denied. Following a three-day trial on the issue of liability, the jury returned a verdict in favor of the defendant and against the plaintiff. Specifically, in response to a Memo to the jury, the jury found that a security guard was negligent but that his negligence was not a substantial factor in causing the

incident. The jury also found that no security guard committed an intentional act against the plaintiff. Finally, the jury found that although both defendants were negligent in training or supervising their employees, the negligence was not a substantial factor in causing the incident. The Court polled the jury and all members concurred in the verdict. Presently before the court is the plaintiff's amended motion for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. For the reasons which follow, the motion is denied.

A district court may exercise its discretion to grant a motion for a new trial if there was substantial error in the admission or exclusion of evidence or in the court's instructions, or the verdict was inadequate or excessive or against the weight of the evidence. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). The authority to grant a new trial is within the sound discretion of the district court. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam). In deciding whether to order a new trial, the court must guard against substituting its own judgment of the facts and the credibility of the witnesses for that of the jury. *See Olefins Trading, Inc. v. Han Yang Chem. Corp.*, 9 F.3d 282, 289-90 (3d Cir. 1993) (purpose of "miscarriage of justice" standard for new trial is to ensure that trial court does not replace jury verdict with its own version of facts).

Plaintiff asserts three grounds in support of his motion for a new trial. First, plaintiff claims that the court erred when it bifurcated the trial of this case, *sua sponte*, "based on the Court's own routine practice of bifurcating cases rather than upon legally sufficient grounds relating to the case itself." Plaintiff's Amended Motion for a New

Trial at 5. According to plaintiff, "[t]he bifurcation resulted in the jury's improperly focusing on the events after [plaintiff] dropped from the barricade in deciding whether defendants' negligence was a substantial contributing factor to the 'incident,' resulting in a defense verdict on causation." *Id.* Plaintiff also claims the court erred when it failed to instruct the jury on multiple causation. Finally, plaintiff argues that the Court erred when it refused to allow plaintiff's security expert to opine as to whether the defendants' negligent training program was a substantial contributing factor to the accident. We shall address each issue *in seriatim.*

Plaintiff's counsels' argument that the court *sua sponte* bifurcated this case based not on the circumstances of this case, but on its own routine practice of bifurcating cases is nothing more than a cover to a weak, poorly conceptualized theory of liability which plaintiff's counsel hoped to keep from the jury by having them focus on doctors's testimony concerning the severity and treatment of plaintiff's injuries. The jury did hear about the nature of plaintiff's injuries from plaintiff and anyone else who knew about plaintiff's injuries. The jury also heard about the manner in which plaintiff was taken to the hospital. The hospital report was also read into the record.

Rule 42(b) of the Federal Rules of Civil Procedure states that the Court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim or of any separate issue. The decision of whether or not to bifurcate a case is firmly within the discretion of the trial court. *Barr Laboratories, Inc. v. Abbott*

Laboratories, 978 F.2d 98, 115 (3d Cir. 1992); *Idzojtic v. Pennsylvania R.R. Co.,* 456 F.2d 1128, 1230 (3d Cir. 1972). To be reversible, an order to bifurcate must result in demonstrable prejudice to the plaintiff and be an abuse of discretion. *Barr, supra; Franklin Music Co. v. American Broadcasting Companies, Inc.,* 616 F.2d 528, 538 (3d Cir. 1979).

In the first instance, the Court does not engage in a routine practice of bifurcating all of its trials between liability and damages. Incredibly, plaintiff's counsel has taken the time and expense of having a paralegal review 307 editions of the Legal Intelligencer from January, 1997 through March, 1998 and record each case listed on the court's trial list. The paralegal found 64 civil cases assigned to the court during this period. The paralegal then went to the Clerk's Office and the National Archives Center in Philadelphia and reviewed the files of all but three of the 64 cases. Of these 64 cases, 45 involved potential jury trial where the plaintiff sought damages. Of these 45 cases, the paralegal avers that the court earmarked 29 or 64% for bifurcation. The paralegal further avers that in 17 of these cases or 59%, the court earmarked the case for bifurcation by simply writing "bifurcation" in its Initial Pretrial Report and Order. According to the paralegal, only two of these cases appeared to have been bifurcated at the request of a party. The paralegal reported that the types of cases which the court set for bifurcation include strict liability cases, age, race and sex discrimination cases, personal injury cases as well as cases alleging breach of contract, police misconduct and sexual molestation. Plaintiff's counsel has included among his exhibits to his amended motion for a new trial

copies of each of the Pretrial Report and Orders for the 64 cases his paralegal reviewed. Exhibit G to Plaintiff's Amended Motion for a New Trial.

Plaintiff's counsel might have been well-advised to focus his post-trial energies on the many problems with the liability portion of his case rather than on conducting such useless and unscientific research on what counsel contends is the court's "bifurcation practice." Ironically, plaintiff's own exhibits specifically show that the court does *not* engage in a routine practice of bifurcating all of its cases. The fact that the court bifurcated the trial of only 64% of the cases listed before it for trial during a 14 month period is hardly indicative of a routine practice of bifurcating all of its cases.

Plaintiff's counsel needs to be edified concerning the factors the court considers in deciding whether a case will be bifurcated for trial between liability and damages. Within 90 days after a civil action is filed and assigned to the Court, the court conducts a pretrial conference with all counsel present for all the parties.[1] Prior to the pretrial conference, the court reviews the entire file in the case. During the pretrial conference, the court discusses all aspects of the case with counsel. Specifically, the court asks plaintiff's counsel about the theory of liability and theory of damages and defense counsel about his theory of defense. The court also asks counsel the number of witnesses each plans to call during the liability and damages portion of the trial. The court also considers, when

---

[1] The Court does not have a magistrate assigned and conducts all of its own pretrial proceedings.

applicable, the nature and severity of the plaintiff's injuries and any prejudice that might result from the jury's joint consideration of liabiiity and the plaintiff's injuries. It is only after a careful consideration of these factors and after a discussion with all counsel that the court decides whether the trial in a case should be bifurcated between liability and damages. It is only after conducting this thorough review, that the Court marks the word "bifurcated" on its Initial Pretrial Report. Counsel usually agree that liability is the key issue to be tried. There is generally an agreement on the amount of damages based on the medical records and bills which the plaintiff has provided to the defendant during discovery. Indeed, this case marks the first time the Court has received any objection to its decision to bifurcate a case for trial.

In support of plaintiff's contention that the court erred when it bifurcated this case as part of a routine practice of bifurcating cases, plaintiff directs our attention to a decision by our Court of Appeals in *Lis v. Robert Packer Hospital*, 579 F.2d 819 (3d Cir. 1978). All *Lis* teaches, however, is that a trial court may not adopt a practice of bifurcating every *negligence* case because such a practice was not an exercise of discretion contemplated by Rule 42(b). *Lis* directs the district court to resolve the issue of bifurcation on a case-by-case basis and use its informed discretion in determining whether or not to bifurcate. In fact, the *Lis* court determined that the appellants had not demonstrated prejudice from the bifurcation and refused to remand for a new trial.

Unlike the district court in *Lis*, this court, as detailed above, does *not* have a practice of bifurcating every negligence or any other type of case. Rather, we consider the

specific characteristics of each case and have a thorough discussion of the issues before determining whether or not to bifurcate. Plaintiff's counsel are usually cognizant of the cost of having experts they may not need. Indeed that is exactly what we did in this case. The main reason why we bifurcated the trial between liability and damages was because the evidence on the question of liability was entirely different from the evidence on the amount of damages. Liability was vigorously contested by the defense. In the liability phase, the jury would hear evidence relating solely to the cause of the accident whereas in the damages phase the jury would hear evidence relating to the severity and treatment of plaintiff's injuries as well as economic statistics concerning plaintiff's loss of earnings. Plaintiff listed as many as seven potential witnesses during the damages phase of the trial. Defendant Spectaguard listed two witnesses and estimated that the damages trial would take an additional one or two days. Defendant SMI of Patterson Avenue listed four potential damages witnesses. Most of these witnesses were doctors whose testimony concerned the severity and treatment of plaintiff's injuries. It would be a waste of everyone's time and the jury's time to hear evidence on damages if the jury found the defendants were not liable for the injuries in the first place. The court did allow plaintiff's counsel to present at great length to the jury the nature of plaintiff's injuries during the liability phase. For all of these reasons, we find there was no abuse of discretion in the decision to bifurcate.

Plaintiff makes much of the fact that the court did not issue a written opinion, detailing its reasons for deciding to bifurcate the trial. Neither Rule 42 nor any other

authority require the Court to issue a written decision. All that is required by Rule 42 as interpreted by the courts is that the court make an informed decision on a case-by-case basis. Indeed, as detailed above, that is exactly what the court did here and so notified counsel during a telephone conference.

Plaintiff claims he was materially prejudiced by the court's decision to bifurcate because he was unable to have his treating orthopedist, Dr. Ronald M. Greene, testify on the issue of causation of plaintiff's injuries. According to plaintiff, Dr. Greene's testimony was "necessary to prevent the jury, in deciding causation, from focusing on what happened to [plaintiff] *after* altercation with the guards." Plaintiff's Memorandum in Support of Amended Motion for a New Trial at 20 (emphasis in original). Plaintiff specifically points to Dr. Greene's videotaped testimony during which Dr. Greene testified, "So the truth is, getting pulled over the fence is probably the only way that he could have a fracture dislocation at the level that he had, which is below his fusion." Deposition of Ronald M. Greene at pp. 43-44.

The court did not preclude plaintiff from playing any portion of the videotaped deposition of Dr. Greene regarding causation during the liability portion of the trial. In fact, plaintiff's counsel never sought to offer the videotaped deposition of Dr. Greene with respect to causation. Having consciously chosen not to call Dr. Greene during the liability phase of the trial concerning causation, plaintiff's counsel cannot claim he was prevented from doing so by the court's decision to bifurcate the trial.

Plaintiff's counsel also waxes philosophically about the need for the jury to hear the entire case at one time so that it may rely on its experience to render an informed and just verdict. It has been this court's experience that jurors are intelligent and able to render a just liability verdict without having to be burdened with potentially irrelevant testimony about damages. In any event, plaintiff's counsel admits that he was allowed to tell the jury in detail about the nature of plaintiff's injuries.

Indeed, plaintiff's argument that the jury needs to hear every aspect of a case in order to bring their common sense to render a just verdict is ironic given plaintiff's counsel efforts to specifically exclude evidence of plaintiff's alcohol and drug use prior to and during the concert as well as plaintiff's criminal record, including information relating to arrests without convictions and information relating to convictions of non-felony crimes. The court was extremely lenient to plaintiff in prohibiting the defendants from evidencing or arguing at trial any information about plaintiff's prior injuries which were similar to the injuries plaintiff suffered in this case, plaintiff's criminal record and drug use before and after the concert. Yet, even with the benefit of these rulings, plaintiff's counsel could not convince the jury of the merits of his case.

Plaintiff next argues that the court erred when it failed plaintiff's "requested jury charge on multiple causation." The title of this argument is somewhat inaccurate since plaintiff's counsel never submitted a proposed point for charge on multiple causation nor formally took exception to or objected to the court's failure to charge

the jury on this issue. Indeed, defendants argue that for this reason, plaintiff has waived this argument.

In order to preserve an issue for appeal, counsel must state "distinctly the matter objected to and the grounds of the objection." Fed.R.Civ.P. 51. "Whether that occurs in an objection to the charge, in a request to charge, or otherwise, however, should not be determinative of the waiver issue. *Smith v. Borough of Wilkinsburg*, 1998 WL 324608 (3d Cir. June 17, 1998).

Here, plaintiff's counsel did not submit a proposed point for charge on the issue of multiple causation. Nor did he raise an objection at the close of the charge. It was only after a juror, during deliberations, sent a question to the court about causation that plaintiff's counsel raised the issue and even then after the court answered the question to the jury's satisfaction and the jury retired to the jury room that plaintiff's counsel requested the court instruct the jury on multiple causation. Specifically, in response to a question by the jury as to what the court meant on its verdict sheet by "causing the incident", the court reread its instruction on proximate cause as follows:

> The best I can give you is what I gave you earlier about proximate cause. Even though the guards might have been found by you to have acted negligently as to the plaintiff, plaintiff cannot recover on this fact alone, unless you, ladies and gentlemen of the jury, also find that this negligence was the proximate cause of the accident. Proximate cause means that there must be a sufficient causal connection between the act or omission of a defendant and the accident. An act or omission is a proximate cause if it was a substantial factor in bringing about or actually

> causing the accident, that is if the accident was a reasonably foreseeable consequence of the defendant's act or omission. A substantial factor is an actual, real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor having no connection or only an insignificant connection with the accident.
>
> Does that answer your question?
>
> JUROR NO. 1: Yes.

Notes of Testimony, March 5, 1998 at 48.

The Court then resolved another question the jurors had and directed the jury to return to the jury room to continue their deliberations. At this time, the following exchange took place between the court and plaintiff's counsel:

> THE COURT: An act or omission. A substantial factor is an actual, real factor that may be real and unexpected. Proximate means there must be a causal connection and they said that answered their question.
>
> [PLAINTIFF'S COUNSEL]: That emphasizes the substantial part of it, but the problem is there is another standard instruction that talks about you can have two substantial causes of an accident. I would like them to be instructed on that part. They may be thinking if we find Mr. White substantially contributed, we can't find Mr. Collins substantially contributed. I think we can say they both contributed.

Id. at 49-50.

The record reflects that the jury then entered the courtroom and was dismissed for lunch. *Id.* at 50.

Since counsel did make the court aware of its request for an instruction on multiple causation, albeit at the eleventh hour, we find that counsel properly preserved his objection.

In any event, we did not err in not giving an instruction on multiple causation at the eleventh hour. Plaintiff claims the instruction was necessary because "a fair view of the evidence would have been that [plaintiff and the security guards *all* substantially contributed to [plaintiff's] dropping from the barricade." Plaintiff's Memorandum in Support of Amended Motion for New Trial at 24. As detailed above, our charge on proximate cause does not exclude multiple causes. Specifically, the charge states that "[a]n act or omission is *a* proximate cause if it was *a* substantial factor in bringing about or actually causing the accident, that is, if the accident was a reasonable foreseeable consequence of the defendants' act or omission. A substantial factor is an actual, real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the accident." By instructing the jury that an act is a proximate cause of an accident if it was *a* substantial factor, we allowed the jury to consider that there may be more than one substantial factor or proximate cause of an accident.

In addition, the verdict sheet specifically allowed the jury to find that the actions of plaintiff, the security guards and even the security agencies themselves were

all substantial factors in causing the incident. The Court explained the verdict sheet in explicit detail to the jurors before they began their deliberations.

Finally, plaintiff argues that the court erred when it refused to allow plaintiff's liability expert, Terrence Gibbs, to answer the following question by plaintiff's counsel:

Q. Do you have an opinion with reasonable certainty as to whether the inadequacy of the training program was a substantial contributing factor to Mr. White's injury?

[DEFENSE COUNSEL]: Objection.

THE COURT: I will sustain the objection.

N.T., March 3, 1998 at 34.

Plaintiff contends that given his expert's prior testimony about the flawed nature of defendants' training programs, his expert should have been allowed, under Rule 704 of the Federal Rules of Evidence, to give an opinion as to whether the inadequacy of the training program was a substantial factor in causing plaintiff's injury.[2]

In the first instance, the record reveals that plaintiff's counsel never took exception to the Court's ruling nor submitted an offer of proof. Therefore, plaintiff has failed to properly preserve this issue.

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[2] Rule 704(a) provides that " . . . testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Although Rule 704 does not preclude an expert from testifying to an ultimate issue, expert testimony which "merely tell[s] the jury what result to reach," is improper. Fed.R.Evid. 704 advisory committee's note. *See also Hugh v. Jacobs*, 961 F.2d 359, 364 (2d Cir. 1992). Furthermore, expert testimony which expresses a legal conclusion should be excluded. *See Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Plan and Trust Agreement, et al.*, 812 F.Supp. 1376, 1378 (E.D.Pa. 1992). Here, any testimony by plaintiff's expert that the defendants' negligent training was the proximate cause of plaintiff's injuries would have the effect of instructing the jury what result to reach, thereby taking the issue away from the jury's consideration.

In addition, it is one thing for plaintiff's expert to form an opinion on the inadequacies of defendant's training programs in general and another matter for plaintiff's expert to conclude that the inadequacies of these programs proximately caused the specific incident in question. Plaintiff's expert was not present at the scene that night and thus had no way of knowing what factors, including the actions of plaintiff himself, caused the guards to act in the manner they did. Any expert opinion on the causation issue would have been pure speculation and precluded the jury from considering the issue along with all the other issues. It is the jury which ultimately must decide based on the *totality of the circumstances* of the trial whether the defendants' alleged negligent training of its guards was the proximate cause of the accident. Based on the totality of the circumstances, the jury found the defendants were negligent in training or supervising

their employees but that their negligence was not a substantial factor in causing the incident.

In sum, we find there was no substantial error in bifurcating this case between liability and damages, in the court's instructions or in the court's evidentiary rulings. The verdict was certainly not against the weight of the evidence. Indeed, plaintiff's counsel did not even bother to file a motion for judgment as a matter of law. The evidence showed that plaintiff attended the concert in an inebriated state and in a manner which jeopardized not only his own safety but the safety of others at the concert as well. He repeatedly refused to comply with the guards' directives that he not sit on the barricade which separated the crowd from the stage and even punched one of the guards when asked to move. There were complaints that plaintiff was blocking the view of the stage from the people sitting in the front. The guards noticed that these spectators were becoming agitated and feared that this would lead to an altercation and ultimately to a riot. The Court was also very lenient to plaintiff in excluding from the trial evidence of cocaine in plaintiff's system on the night of the concert as well as plaintiff's criminal record and substantially similar prior injuries.

For all the foregoing reasons, we, deny plaintiff's motion for a new trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIMOTHY M. WHITE

VS. C.A. NO. 92-1724

SMI OF PATTISON AVENUE, L.P.,
and SPECTAGUARD, INC.

ORDER

The motion of the plaintiff for a new trial is DENIED.

The amended motion of the plaintiff for a new trial is DENIED.

IT IS SO ORDERED.

/s/ Charles R. Weiner
CHARLES R. WEINER

Supreme Court, U.S.
FILED
NOV 26 1999

No. 99-769

IN THE

Supreme Court of the United States

TIMOTHY M. WHITE,

Petitioner,

v.

SPECTAGUARD, INC. and
SMI OF PATTISON AVENUE, L.P.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT SMI OF PATTISON AVENUE, L.P.

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Lis v. Robert Packer Hospital, 579 F.2d 819 (3d Cir. 1978), *cert. denied*, 439 U.S. 955 (1978) 4, 5

Rule:

Fed. R. Civ. P. 42(b) 2, 3, 4, 5, 6

The Respondent, SMI of Pattison Avenue, L.P. ("SMI"), respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the opinion of the United States Court of Appeals for the Third Circuit in this case.

STATEMENT OF THE CASE

Petitioner, Timothy White, filed a complaint in the United States District Court for the Eastern District of Pennsylvania on March 24, 1992, seeking recovery against SMI and other defendants, for injuries suffered when, while attending a rock concert at the Spectrum Arena in Philadelphia, Pennsylvania on April 6, 1990, he fell from the stage barricade during an altercation with security personnel. (Petition Appendix "Pa" 2-3).

The district court, after reviewing the file and consulting with counsel at a pretrial conference held on June 1, 1992, bifurcated the case into liability and damage phases. (Pa 5, 23). Petitioner White was represented by different counsel at the time of the 1992 conference than he was during the telephone court conference call with counsel on December 9, 1997. At that time, the district court reiterated its bifurcation ruling and White's present counsel noted his objection. The court overruled the objection, finding that bifurcation was proper. There was no serious dispute that White had been injured, but that liability was hotly contested and the evidence and witnesses for liability and damages were completely separate. (Pa 6, 24, 30).

On February 13, 1998, White filed a motion for reconsideration of the court's decision to bifurcate this case. In response to White's motion, on February 17, 1998, the court conducted a telephone conference. After hearing the

arguments of the parties, the court denied White's motion for reconsideration, but did agree to allow White to explain to the jury the nature of his injury during the liability phase of the trial. (Pa 6, 24, 30).

The liability phase was tried before a jury on March 2-5, 1998. At trial, the evidence showed that White attended the concert in a highly inebriated state and in a manner which jeopardized not only his own safety, but the safety of others at the concert as well. He repeatedly refused to comply with the security guards' directives that he not sit on the barricade which separated the crowd from the stage; and he even punched one of the guards when asked to move. The evidence showed that it was White's extreme intoxication and his negligence as a result of that intoxication that were the cause of his injury. (Pa 38).

Following the three day trial on the issue of liability, the jury returned a verdict in favor of co-defendants SMI and SpectaGuard and against White.

White moved for a new trial on three grounds. The sole ground which is at issue herein is whether the district court's decision to bifurcate was determined through the exercise of informed discretion as contemplated by Fed. R. Civ. P. 42(b).

In denying White's motion for a new trial, the district court detailed the analysis which led to its reasonable and informed decision to bifurcate the liability and damage phases of trial. (Pa 23-24, 27-30). The district court also recognized that White suffered no prejudice in the manner in which the case was tried. (Pa 31).

On appeal, the United States Court of Appeals for the Third Circuit affirmed the ruling of the district court. The Third Circuit Court of Appeals held that "[n]othing in the record establishes that the trial judge had a routine practice of bifurcating personal injury or any other types of cases" and that "the record reflects that the district court evaluated the factors set forth in Fed. R. Civ. P. 42(b) and that its decision to bifurcate the trial between liability and damages was the product of an informed exercise of discretion." (Pa 6-7). In addition, the Third Circuit recognized that White failed to demonstrate that he was prejudiced in any respect whatsoever by the bifurcation decision. (Pa 7-8).

REASONS FOR DENYING THE WRIT

The entire foundation for Petitioner's Petition for Writ of Certiorari is based on the premise that the district court bifurcated the liability and damage phases of this case without engaging in an informed analysis. This premise is incorrect. The district court detailed its analysis which led to the reasonable and informed decision to bifurcate. (Pa 23-24, 27-30). The Third Circuit then found that there was nothing in the record which established that the district court had a routine practice of bifurcating cases, and that, in fact, the record reflected that the district court had evaluated the factors set forth in Fed. R. Civ. P. 42(b) and that its decision to bifurcate the trial between liability and damages was the product of an informed exercise of discretion. (Pa 6-7).

The questions which Petitioner seeks to raise in his Petition regarding "assembly-line bifurcation" (Question 1) and "bifurcating . . . without engaging in an informed analysis" (Question 2) are simply not presented in this action, and indeed, the lower courts have so held. It would be

unwarranted and inappropriate for this Court to review hypothetical issues presented by the Petitioner which have no legitimate support in the evidentiary record of this litigation.

The decision of the courts below was a correct application of settled law. No conflict among the circuits is even alleged.

Fed. R. Civ. P. 42(b) provides, in relevant part, that the "court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any, claim . . ." The decision of whether or not to bifurcate a case is firmly within the discretion of the trial court. *Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 115 (3d Cir. 1992). To be reversible, an order to bifurcate must result in demonstrable prejudice to the plaintiff and be an abuse of discretion. *Franklin Music Co. v. American Broadcasting Companies, Inc.*, 616 F.2d 528, 538 (3d Cir. 1979); *Barr Laboratories*, 978 F.2d at 115. (Pa 7-8, 26-27).

In *Lis v. Robert Packer Hospital*, 579 F.2d 819 (3d Cir. 1978), *cert. denied*, 439 U.S. 955 (1978), the trial court had a standing, general policy of bifurcating all negligence cases. In *Lis*, the Third Circuit ruled that the Draconian remedy of a new trial would not be granted absent a showing of prejudice. In dicta, the court stated that a standard, bright line rule of bifurcating all negligence cases was inappropriate and that a showing of prejudice "may not be necessary" in the future, if the trial court could not support its decision to bifurcate under the circumstances of a particular case. *Id.* at 825.

Since the *Lis* decision, however, the Third Circuit has consistently restated the principal that a district court's decision to bifurcate would not be set aside absent a showing of prejudice. The year after the *Lis* opinion, the Third Circuit decided *Franklin Music v. American Broadcasting Co.*, 616 F.2d 528, 538 (3d Cir. 1979) and reiterated the rule that a bifurcation decision will be reversed only if the bifurcation resulted in demonstrable prejudice and was an abuse of judicial discretion. *See also Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 115 (3d Cir. 1992) ("Barr is not entitled to rely upon the *Lis dicta* to excuse its failure to demonstrate prejudice resulting from the bifurcation to which it objects.") (Pa 7-8).

In this case, the courts below held that, unlike the trial court in *Lis*, this trial court did not have a standing, general, routine policy of bifurcating all negligence cases. The courts below held that the trial court clearly evaluated the factors set forth in Fed. R. Civ. P. 42(b) and that its decision to bifurcate the trial between liability and damages was reasonable, informed, and a proper exercise of discretion. (Pa 7). Moreover, the courts below determined that there was a complete absence of any prejudice suffered by White by the court's bifurcation decision. (Pa 7-8, 27, 31). The decision to bifurcate was not improper and was not an abuse of judicial discretion.

The crux of the petition is really a factbound allegation that the courts below reached an improper factual conclusion regarding the district court's bifurcation decision. There is no confusion or conflict in the lower courts that Fed. R. Civ. P. 42(b) is a valid and existing rule of law. Petitioner is merely seeking review of an allegedly erroneous factual

finding or the alleged misapplication of a properly stated rule of law. There is no valid cause for this Court's review.

Bifurcation of the trial in this case was authorized and justified. The lower courts determined that the district court made a reasoned and informed decision to bifurcate the liability and damage phases of the trial and that its decision constituted a valid exercise of its discretion pursuant to Fed. R. Civ. P. 42(b). Significantly, the courts below found that the bifurcation decision did not result in any prejudice to Petitioner. Petitioner's challenge to this proper application of settled law does not warrant this Court's review.

CONCLUSION

For all of the foregoing reasons, Respondent, SMI of Pattison Avenue, L.P., by its undersigned counsel, respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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(3)

Supreme Court, U.S.
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No. 99-769

IN THE

Supreme Court of the United States

TIMOTHY M. WHITE,

Petitioner,

v.

SMI OF PATTISON AVENUE, L.P.,
SPECTAGUARD, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT SPECTAGUARD, INC.

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QUESTION PRESENTED

Did the United States Court of Appeals for the Third Circuit properly apply well-settled law when it affirmed the district court's discretionary decision to bifurcate the trial where the district court did not routinely bifurcate cases and where the district court's decision was based on Rule 42(b) factors?

CORPORATE DISCLOSURE STATEMENT

SpectaGuard, Inc. is not owned by any parent corporation. No publicly held corporation owns more than 10% of SpectaGuard, Inc.

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STATEMENT OF THE CASE

1. Nature Of The Case

On April 6, 1990, Mr. White, who had a history of having previously broken his neck, was attending a Mötley Crüe concert at the Spectrum Arena in Philadelphia. Before entering the Arena, Mr. White had consumed alcohol and drugs. When the band began to play, the crowd on the floor of the arena rushed forward; Mr. White himself rushed to the very front, to the barricade separating the crowd from the stage.

On two or three occasions, Mr. White climbed onto the barricade separating the crowd from the performers. Though Mr. White was told to get off the barricade by security, he repeatedly climbed onto it. Mr. White eventually punched a security guard, Ed Collins, in the mouth. In the scramble that ensued, in the attempt to eject Mr. White, Mr. White either fell or was pulled over the barricade, struck the floor and allegedly broke his neck. Security guards testified that, in the melee, Mr. White fell from the barricade. Mr. White testified that he was injured as a result of being pulled backwards over the barricade and thrown to the floor. Mr. White also testified that two or three unidentified guards tried to move him after he had sustained the neck injury. One of Mr. White's fact witnesses, Steve Johannsmeier, testified that after Mr. White's neck was injured, Mr. White was dragged away.

2. Pretrial And Trial Proceedings

On March 24, 1992, Mr. White filed a Complaint in the United States District Court for the Eastern District of Pennsylvania. On June 1, 1992, the district court held a pretrial conference. At the conference, the district court addressed the issue of bifurcation of the trial. Mr. White's current counsel, who was trial counsel, was not counsel of record at the June 1, 1992 pretrial conference, nor was he present. The district court issued a Pretrial Report and Order. (App. 19a). The district court made a handwritten note which was then transcribed into the typewritten order. (App. 18a).

On December 9, 1997, the district court confirmed that trial would be bifurcated to which Mr. White objected. On February 13, 1998, i.e., two weeks before trial, Mr. White filed a motion for reconsideration of the district court's decision to order bifurcation. In his motion, Mr. White argued that the jury was entitled to know of "the great discomfort and inconvenience . . . associated with rehabilitating a broken neck..." while considering liability. He also alleged prejudice relating to the causation opinion rendered by his treating orthopedist, Dr. Ronald M. Greene. Mr. White had videotaped Dr. Greene's trial testimony. In his testimony, Dr. Greene rendered an opinion regarding the mechanics of Mr. White's accident. Mr. White, though, acknowledged that he could play Dr. Greene's causation opinion at the liability phase, while reserving the remainder for the damages phase, when he argued:

> [I]t would be duplicative to play a part of Dr. Greene's testimony on this issue at the liability phase and to replay it as part of playing the testimony in its entirety at the damages phase.

(*See* App. 8a). Both defendants SpectaGuard, Inc. ("SpectaGuard") and SMI of Pattison Avenue, L.P. ("SMI") opposed Mr. White's motion for reconsideration. On February 18, 1998, the district court denied Mr. White's motion for reconsideration. (App. 21a).

The liability phase of trial was conducted from March 2 through 5, 1998. Mr. White never sought to play the portion of Dr. Greene's videotaped deposition which included Dr. Greene's causation opinion. Mr. White never made an offer of proof and the district court never precluded Mr. White from presenting Dr. Greene's causation opinion. Contrary to footnote 1 on page 5 of Mr. White's Petition, Mr. White simply chose not to present Dr. Greene's videotaped opinion testimony at the liability trial. At the conclusion of the liability phase, the jury found in favor of SpectaGuard and SMI and against Mr. White, thereby obviating the need for the damages phase of trial. The jury found SpectaGuard and SMI had been negligent, but that the negligence was not a substantial contributing factor to the incident. The jury also found that no

security guard had committed an intentional act. The district court entered judgment on the jury's verdict.

3. Post-Trial Proceedings

Following the trial and verdict, Mr. White's counsel's paralegal reportedly undertook an unscientific, outside-the-record survey of the bifurcation decisions of the district court. This survey purportedly covered the district court's cases listed over the course of fifteen months in the local legal newspaper, *The Legal Intelligencer.* Based on this survey, Mr. White's counsel concluded that the district court routinely bifurcates trials. However, Mr. White, through his counsel, never adduced the background circumstances of the surveyed cases. His survey did not demonstrate that the district court routinely bifurcated all cases or even all cases of a particular type. Rather, the survey demonstrated only that the district court bifurcated cases of various types, for reasons beyond the scope of the survey.

Mr. White filed a motion for new trial on March 6, 1998 and an amended motion for new trial on March 13, 1998. SpectaGuard and SMI opposed Mr. White's post-trial motions. After briefing by the parties, on August 11, 1998, the district court filed its Memorandum Opinion and Order, denying Mr. White's motion for new trial. The court's opinion exhaustively explicated its reasons for exercising its discretion in bifurcating the trial of this matter. (App. 22a-31a).

4. Mr. White's Appeal To The Third Circuit Court Of Appeals

On August 28, 1998, Mr. White filed a Notice of Appeal. The issue of bifurcation was fully briefed and considered by the Court of Appeals for the Third Circuit. On appeal, SpectaGuard noted that the standard of review required finding an abuse of discretion at the trial level before ordering a new trial. SpectaGuard also noted that the Third Circuit consistently required a showing of prejudice before ordering a new, non-bifurcated trial. SpectaGuard asserted that Mr. White was not prejudiced and had not preserved the issue of his asserted prejudice—Mr. White never made an offer of

proof as to treating orthopedist Dr. Greene's causation opinion and the Court never precluded Mr. White from presenting Dr. Greene's causation opinion. SpectaGuard argued that the district court's decision to bifurcate was based on the factors outlined in Fed. R. Civ. P. 42(b). Finally, SpectaGuard asserted that this case was distinguishable from the 1978 case upon which Mr. White so heavily relied, *Lis v. Robert Packer Hospital,* 579 F.2d 819 (3rd Cir. 1978), *cert. denied,* 439 U.S. 955 (1978), in which the Third Circuit criticized a district court's policy of bifurcating all negligence trials although the Third Circuit did *not* order a new trial in *Lis*.

In the present case, the Third Circuit affirmed the district court's denial of Mr. White's motion for new trial. The Third Circuit noted that the standard of review was abuse of discretion. (App. 4a). It held that the district court properly exercised informed discretion and considered the bifurcation issue at least three times prior to trial. (App. 5a-7a). The Third Circuit found that the district court had *no* routine practice of bifurcating all trials of a particular variety. (App. 6a). Finally, the Third Circuit held that Mr. White failed to meet his burden of demonstrating prejudice from the district court's bifurcation decision. (App. 7a-8a).

REASONS FOR DENYING THE WRIT

Mr. White fails to provide any compelling reasons for this Court to grant the writ of certiorari. The Third Circuit's decision properly applied well-settled law regarding bifurcation of trials.

1. There Are No Compelling Reasons To Grant Mr. White's Petition

Mr. White's Petition For Writ Of Certiorari ("Petition") should be denied; it presents no compelling reasons why this Court needs to address the Third Circuit's affirmance of an informed, discretionary decision made by the district court to bifurcate this matter.

There is no dispute as to the rule of law applied. Rule 42(b) permits bifurcation of trials, "in furtherance of convenience or to avoid prejudice, or when . . . conducive to expedition and economy . . . ." District courts have broad discretion to bifurcate and may only be reversed for abusing that discretion. The United States Courts of Appeals uniformly affirm the district courts' discretion in deciding whether to bifurcate trials. *See, e.g., Gonzalez-Martin v. Equitable Life Assurance.*, 845 F.2d 1140 (1st Cir. 1988); *In re Master Key Antitrust Litigation*, 528 F.2d 5, 14 (2nd Cir. 1975); *Franklin Music Co. v. American Broadcasting Companies, Inc.*, 616 F.2d 528 (3d Cir. 1979); *United States v. King*, 582 F.2d 888 (4th Cir. 1982); *Rossano v. Blue Plate Foods, Inc.*, 314 F.2d 174, 176 (5th Cir.), *cert. denied*, 375 U.S. 866 (1963); *Saxon v. Titan-C Manufacturing*, 86 F.3d 553 (6th Cir. 1996); *Davis v. Freels*, 583 F.2d 337, 343 (7th Cir. 1978); *Beeck v. Aquaslide 'N' Dive Corp.*, 562 F.2d 537 (8th Cir. 1977); *Davis & Cox v. Summa Corp.*, 751 F.2d 1507 (9th Cir. 1985); *Angelo v. Armstrong World Industries.*, 11 F.3d 957 (10th Cir. 1993); *Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253 (11th Cir. 1983).

The Third Circuit's decision in this matter does not conflict with the decisions of other circuits. In this matter, the Third Circuit reviewed the district court's bifurcation decision and found no abuse of discretion. The Third Circuit did not depart from the usual course of judicial proceedings, nor did

it sanction any gross deviation by the district court. The Third Circuit found that the district court evaluated the Rule 42(b) factors and that its decision "was the product of an informed exercise of discretion." (App. 7a). Recognizing the correctness of the district court's approach and the appropriateness of its exercised discretion, the Third Circuit affirmed the district court. Accordingly, Mr. White's Petition asserts as error what essentially is no more than an alleged misapplication of a properly stated and well-settled rule of law. Hence, Mr. White's Petition does not invoke the considerations governing review on certiorari set forth in Rule 10(a) of the Rules of The Supreme Court of The United States.

Mr. White's Petition tries to invoke, but ultimately eludes, the considerations governing review on certiorari set forth in Rule 10(c) of The Rules of The Supreme Court of The United States. In this matter, the Third Circuit did not decide any important question of federal law which should be addressed by this Court. Mr. White has attempted to elevate the significance of his case by asserting (incorrectly) that the trial court in this matter had a policy of routine bifurcation, a policy which was criticized some 20 years ago in *Lis v. Robert Packer Hospital, supra,* where a district court judge bifurcated every negligence case regardless of the circumstances. While Mr. White's argument lacks foundation – the district court in this matter had no such policy – even in the *Lis* case this Court denied certiorari at 439 U.S. 955 (1978).

Mr. White's Petition attempts to create the specter of an important legal issue at stake but a review of the authorities he cites indicates that the issues relating to bifurcation of trials were addressed decades ago. All five of the Circuit Court cases relating to bifurcation cited by Mr. White were decided before 1980. Similarly, a majority of the secondary sources cited by Mr. White pre-date 1980. Mr. White's Petition demonstrates there is no reason to grant said Petition. The practical considerations as well as the policies involved in bifurcation of trials were addressed several decades ago. There is no reason to revisit the issues now.

2. Bifurcation Is A Matter Of Judicial Discretion

Bifurcation is a practice which is authorized under Fed.R. Civ.P. 42(b). The court in its discretion may order the bifurcation of a trial in the furtherance of expedition and economy or in the avoidance of prejudice. The court's decision to bifurcate is highly discretionary and is made by balancing the equities of each case. *Corrigan v. Methodist Hospital,* 160 F.R.D. 55 (E.D. Pa. 1995). The court may issue an order bifurcating a case, even on its own motion, within its discretion. *Saxon v. Titan-C Manufacturing,* 86 F.3d 553 (6th Cir. 1996); *Franklin Music, supra* (district court ordered bifurcation over objection of all parties); *Moss v. Associated Transport, Inc.,* 33 F.R.D. 335 (E.D.Tenn. 1963), *aff'd,* 344 F.2d 23 (6th Cir. 1965). The court's decision to bifurcate will only be set aside on appeal for an abuse of discretion. *Franklin Music, supra.; DeAnda v. City of Long Beach,* 7 F.3d 1418 (9th Cir. 1993).

3. Bifurcation Of This Trial Was Justified

Bifurcation is appropriate when it will enhance juror comprehension by temporarily excluding evidence which could cloud the true issues. *Barr Laboratories, Inc. v. Abbott Laboratories,* 978 F.2d 98 (3d Cir. 1992). In this case, plaintiff raised claims of assault and battery and negligent training, alleging defendants SMI and SpectaGuard caused plaintiff's broken neck. In defending against the assault and battery claim, defendants asserted that the security guards involved were privileged to use reasonable force in self-defense, or in the defense of others. Under Pennsylvania law, reasonable force is that level of force which is *not likely* to inflict death or serious bodily harm. Extensive presentation of evidence regarding Mr. White's broken neck could have confused the issue of whether the force employed was likely or unlikely to cause serious bodily injury. When a plaintiff's injuries are severe or prejudicial in some respect, yet unrelated to liability, bifurcation is proper. *See, Lieberman-Sack v. Hartford Community Health Plan of New England,* 882 F.Supp. 249 (D.R.I. 1995); *Miller v. New Jersey Transit,* 160 F.R.D. 37 (D.N.J. 1995); *Zofcin v. Dean,* 144 F.R.D. 203 (S.D.N.Y. 1992).

Bifurcation is also authorized to reduce cost and expense. If the resolution of a particular fact or issue could considerably shorten the trial, the court does not abuse its discretion in ordering bifurcation where the bifurcation preserves judicial resources and expenses. *See In Re Paoli R.R. Yard PCB Litigation*, 113 F.3d 444, 453, n.5 (3d Cir. 1997). *See also Rossano v. Blue Plate Foods, Inc., supra; Reines Distributors, Inc. v. Admirable Corp.*, 257 F.Supp. 619 (S.D.N.Y. 1965). Additionally, where a plaintiff's verdict is far from assured, a separate trial on the liability issues is appropriate. *Hahn v. Woodlyn Fire Co.*, 32 F.R.D. 429, 431 (E.D.Pa. 1963).

In its post-trial Memorandum Opinion and Order, the district court demonstrated its consideration of factors relevant to bifurcation, i.e., theories of claims and defenses, the number of liability witnesses versus the number of damages witnesses, the nature and severity of petitioner's injuries and how petitioner's injuries could affect the jury's consideration of liability. (App. 28a-31a). As noted by the district court, the liability evidence was completely different from the damages evidence for which plaintiff listed as many as seven potential witnesses. Thus, it made sense for the jury to focus its attention on liability first, then consider damages. *Id.*

As to Mr. White's contention that the district court inappropriately bifurcated this matter at a premature stage of the proceedings, the law does not mandate that a decision to bifurcate await the eve of trial of the matter. Additionally, at the early stages of this litigation, and in particular the Pretrial Conference with accompanying Order of June 1, 1992, Mr. White's current counsel was not the attorney of record. He has no personal knowledge regarding what transpired at the Pretrial Conference. Furthermore, as noted by the Third Circuit, the district court could evaluate the case in its embryonic stages and later reconsider the issue which the district court did twice before trial. (App. 6a-7a). Mr. White makes much of the fact that there are two (2) versions of the district court's June 1, 1992 Order - the initial, handwritten one and the typed one - a fact of absolutely no consequence. The district court clearly acknowledges that bifurcation was addressed at the

June 1, 1992 Pretrial Conference. What Mr. White fails to acknowledge is that the district court had ample time and opportunity to consider and reconsider bifurcation before trial. In fact, the record evidences that the district court's attention was repeatedly focused prior to trial upon whether the case should be bifurcated. *Id.*

4. Mr. White Was Not Prejudiced By The Bifurcation Of This Matter

An order to bifurcate is unassailable if it does not result in prejudice to the parties. To be reversible, an order to bifurcate must result in demonstrable prejudice and must be an abuse of judicial discretion. *Franklin Music, supra.* On page 5 of his Petition at footnote 1, Mr. White claims he did not present the testimony of Dr. Greene because his videotaped deposition testimony was part of the "damages" part of the case. Mr. White's assertion is merely a repackaged phrasing of an argument which was rejected by the Third Circuit. In the Third Circuit, Mr. White's counsel argued that the district court's bifurcation left him with "the impression" that he was not permitted to present the videotaped liability testimony of his orthopedic expert, Dr. Greene, to the jury during the liability phase, and that he was prejudiced thereby. His counsel argued that the district court never "volunteered" that he was permitted to present Dr. Greene's causation testimony in the liability phase. Regardless of how Mr. White states the point, the fact remains that the omission of Dr. Greene's testimony was not the result of the decision to bifurcate and Mr. White has failed to establish any prejudice from the bifurcation. In rejecting Mr. White's argument that he was not able to present Dr. Greene's testimony in the liability phase, the Third Circuit noted:

> It is undisputed, however, that the district court's ruling on White's objection to bifurcation did not include a ruling that White could not present any portion of Dr. Greene's testimony which was relevant to the liability issue. Appellant's counsel admits, moreover, that Dr. Greene was not identi-

> fied as a liability witness in his pretrial statement and further that counsel did not seek to submit any part of the videotaped testimony during the liability phase. In his motion for reconsideration of the bifurcation decision, appellant's counsel argued against bifurcation on the ground, *inter alia*, that it would be duplicative to play the relevant portion of Dr. Greene's testimony during both phases of the trial. (A. 78). Thus, the record reflects that the district court had given counsel no reason to believe that he would be precluded from submitting Dr. Greene's testimony during the liability phase of the trial. Having failed to make even a proffer of Dr. Greene's testimony during the liability phase of the trial, White cannot now claim prejudice from its omission solely because the trial was bifurcated.

(App. 7a-8a). Nothing in this matter established that Mr. White was prejudiced by the bifurcation decision.

5. The District Court Exercised Its Informed Discretion In Bifurcating This Case: It Had No Policy Of Routinely Bifurcating Cases

Mr. White complains to this Court, as he did to the Third Circuit, that the district court's decision to bifurcate *this* trial was procedurally flawed. He continues to argue, albeit without foundation, that the district court routinely bifurcates cases. Mr. White continues to complain that the district court did not issue a contemporaneous, written opinion in support of its decision to bifurcate this matter. As noted previously, the district court had no policy of routinely bifurcating cases. Additionally, no rule of law requires a contemporaneous, written opinion for every bifurcation decision by a trial court. More importantly, plaintiff's unfounded complaints do not justify review by this Court.

Mr. White's attempts to analogize this case to the circumstances of *Lis*, *supra* in which the Third Circuit criticized a district court's policy of routinely bifurcating all negligence cases, *Lis*, 579 F.2d at 824, ignore the teachings of *Lis*. The fact

that the district court in *Lis* had a policy of bifurcating *all* negligence cases revealed that that court was not assessing cases individually and exercising its informed discretion. In the instant case, however, there is no evidence that the district court bifurcated all negligence cases or all cases of any particular variety. Rather, Mr. White criticizes the district court for allegedly bifurcating many of its cases of various types, including strict liability, negligence, discrimination, and other civil rights cases. Mr. White's observation, based on his unscientific survey, simply misses the point made by *Lis*. In fact, his outside-the-record survey of the district court's alleged history of bifurcation decisions, presuming it to be true, suggests that the district court's practice is to assess the cases individually and then exercise its discretion in bifurcating some of the cases, exactly what is required by Rule 42.

6. The Bifurcation Of Mr. White's Case Represents The Proper Application Of Well-Settled Law

In support of his petition, Mr. White sets forth an extended policy argument in opposition to bifurcation of trial. He essentially argues that the jury should have heard his entire case, so that it could lend "beneficial flexibility" to the harsh rules of liability and apply its social conscience, common sense and experience to reach a compromise verdict. In short, what Mr. White is arguing is that because he sustained a broken neck, the jury should have been allowed to hear all the evidence regarding the extent of his alleged injuries so that the jury could be persuaded to reach a compromise verdict on liability.

If the historically cited concern of preserving the possibility of compromise verdicts were the only factor to consider, there would be no bifurcation of trials. However, society juggles and balances many competing concerns and policies within the law. As to bifurcation, specifically, the courts are cognizant of enhancing juror comprehension of the liability issues, *Barr Laboratories, supra;* avoiding undue prejudice due to the severity of the alleged injuries, *Lieberman-Sack, supra;* and reducing costs and expenses for the court and litigants, *In*

re Paoli R.R. Yard, supra. In fact, it has been stated that, "[C]onservation of both time and money are the bedrock basis for the rule..." *Rossano, supra,* 314 F.2d, at 176. The various policy concerns, both for and against bifurcation, are built into Rule 42(b) and the interpretations of that Rule by the courts. As a result, bifurcation is a well-settled, authorized practice. The district court complied with Rule 42(b) in bifurcating this case, and the Third Circuit's affirmance of the district court's decision properly applied the well-settled law regarding bifurcation.

CONCLUSION

For the reasons set forth above, Mr. White's Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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